

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 228

Docket No. SF-0353-09-0650-I-1

**Irma Urena,
Appellant,**

v.

**United States Postal Service,
Agency.**

December 14, 2009

Omar Gonzalez, Burlingame, California, for the appellant.

Joshua T. Klipp, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant timely petitions for review of an initial decision (ID) that dismissed her restoration rights appeal for lack of jurisdiction. For the reasons discussed below, we GRANT her petition under [5 C.F.R. § 1201.115](#)(d)(2), REVERSE the ID, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 At the time this matter arose, the appellant was a PS-06 Mail Processing Clerk on limited duty at the agency's Los Angeles Processing and Distribution

Center (LA P&DC). Initial Appeal File (IAF), Tabs 1, 5, Subtab 4F. On April 29, 2009, the appellant's supervisor issued a letter directing her to leave work that day and not to return until contacted. *Id.*, Tabs 1, 5, Subtab 4F. The letter stated it was based on a determination, as part of the agency's National Reassessment Process (NRP),¹ that there were no operationally necessary tasks meeting the appellant's medical restrictions within her regular hours of duty at her facility. *Id.*, Tab 5, Subtab 4F.²

¶3 The evidence of record shows that the appellant had compensable work-related injuries, i.e., both right and left carpal tunnel syndrome and right rotator cuff syndrome. *Id.*, Tab 4, Subtabs 1, 2; Tab 5, Subtab 4F. The injuries resulted in restrictions on lifting, pushing and pulling, repetitive use of both hands, and reaching above the shoulder. *Id.*, Tab 5, Subtab 4F. The appellant had achieved maximum medical improvement, and her conditions were deemed permanent and stationary. *Id.* Since 2006,³ the appellant had been working in a limited duty assignment, handling check out and return of equipment such as scanners and radios and ensuring the proper operation of the equipment. IAF, Tab 4, Subtab 3; Tab 5, Subtab 4F.

¶4 The appellant appealed her placement off work, alleging a violation of her right to restoration to duty after partial recovery from compensable injuries and disability discrimination based on the denial of reasonable accommodation. IAF,

¹ The NRP is a nationwide agency initiative to provide updated and operationally necessary job offers for limited duty employees who have reached maximum medical improvement. IAF, Tab 5, Subtab 4E.

² The letter states that there were no such tasks "or you have refused to accept available operationally necessary tasks." IAF, Tab 5, Subtab 4F. The agency does not assert, and there is no record evidence, that the appellant refused any assignment.

³ The dates of her injuries were March 25, 1993 (right carpal tunnel), July 21, 1997 (left carpal tunnel) and September 4, 2007 (rotator cuff). IAF, Tab 4, Subtabs 1, 2; Tab 5, Subtab 4F.

Tabs 1, 4, 7. She asserted that the agency's action was arbitrary and capricious because the agency failed to do a proper search for productive work for her, including within the local commuting area. *Id.*, Tabs 4, 7. The AJ found that the appellant did not support this assertion with facts and so did not make a nonfrivolous allegation of violation of her restoration rights. *Id.*, Tab 8 (ID) at 6-7. The AJ also held that the appellant's assertions that the agency failed to follow NRP procedures correctly or comply with obligations under the collective bargaining agreement (CBA) and Employee and Labor Relations Manual (ELM) did not constitute nonfrivolous allegations that the agency's action was arbitrary and capricious. *Id.* Therefore, the AJ dismissed the appeal for lack of Board jurisdiction. ID at 8. The AJ also held that in the absence of jurisdiction over the restoration appeal, the Board had no authority to address the appellant's disability discrimination claim. *Id.*

¶5 The appellant has filed a petition for review (PFR) in which she challenges the AJ's finding that she did not make a nonfrivolous allegation of violation of her restoration rights. Petition for Review File, Tab 1. She cites the agency's response to the appeal, which stated only that it conducted a search for tasks she could perform at her worksite. *Id.* The appellant asserts that the agency failed to provide her with necessary information in discovery and that the AJ failed to rule on the agency's motion for a stay of discovery prior to issuing the ID. *Id.* The appellant also reiterates her arguments on appeal that the agency did not correctly follow NRP procedures or comply with its obligations under the CBA and ELM, and did not provide reasonable accommodation. *Id.* The agency has responded in opposition to the PFR. *Id.*, Tab 3.

ANALYSIS

¶6 The Federal Employees Compensation Act and the Office of Personnel Management's (OPM's) implementing regulations provide that federal employees who experience on-the-job compensable injuries have certain rights to be restored

to employment. [5 U.S.C. § 8151](#); *Tat v. U.S. Postal Service*, [109 M.S.P.R. 562](#), ¶ 9 (2008); 5 C.F.R. part 353. Employees of the U.S. Postal Service are among those with rights to restoration. *See Chen v. U.S. Postal Service*, [97 M.S.P.R. 527](#), ¶ 12 (2004); [5 C.F.R. § 353.102](#). The nature of an employee's restoration rights depends on the extent and timing of recovery from a compensable injury. [5 U.S.C. § 8151](#); *Delalat v. Department of the Air Force*, [103 M.S.P.R. 448](#), ¶ 15 (2006); [5 C.F.R. § 353.301](#) (setting forth restoration rights for those who are fully recovered within or after 1 year, who are physically disqualified, or who are partially recovered).

¶7 OPM's regulations define a physically disqualified employee in pertinent part as someone who, for medical reasons, is unable to perform the duties of the position formerly held or an equivalent one, and whose condition is considered permanent with little likelihood for improvement or recovery. [5 C.F.R. § 353.102](#); *see Kravitz v. Department of the Navy*, [104 M.S.P.R. 483](#), ¶ 4 (2007). A physically disqualified employee has agencywide rights to placement in a position of the same status and pay for 1 year from the time eligibility for injury compensation begins. [5 C.F.R. § 353.301\(c\)](#). After 1 year, the employee's restoration rights are equivalent to those of someone who is fully or partially recovered, as applicable. *Id.*

¶8 A partially recovered employee is one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. [5 C.F.R. § 353.102](#). OPM's regulations provide the following restoration rights to a partially recovered employee:

Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

[5 C.F.R. § 353.301](#)(d). See *Delalat*, [103 M.S.P.R. 448](#), ¶ 17; *Gilbert v. Department of Justice*, [100 M.S.P.R. 375](#), ¶ 15 (2005).

¶9 Board appeal rights in restoration cases derive from OPM’s regulations. *Foley v. U.S. Postal Service*, [105 M.S.P.R. 307](#), ¶ 10 (2007); [5 C.F.R. § 353.304](#). The regulations provide that a partially recovered employee may appeal to the Board only for a determination of whether the agency is acting in an “arbitrary and capricious” way in denying restoration. *Zysk v. U.S. Postal Service*, [108 M.S.P.R. 520](#), ¶ 6 (2008); *Delalat*, [103 M.S.P.R. 448](#), ¶ 17; [5 C.F.R. § 353.304](#)(c). An individual who has been restored to duty may not challenge the details or circumstances of the restoration. *Foley v. U.S. Postal Service*, [90 M.S.P.R. 206](#), ¶ 6 (2001). The Board has held, however, that an agency’s rescission of a previously provided restoration may be an appealable denial of restoration. *Brehmer v. U.S. Postal Service*, [106 M.S.P.R. 463](#), ¶ 9 (2007); see *Foley*, [90 M.S.P.R. 206](#), ¶ 6 (under appropriate circumstances, a restoration may be so unreasonable as to be deemed a denial of restoration, as when a person is unable to perform the duties of the job to which he is restored).

¶10 To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make nonfrivolous allegations that the agency violated her restoration rights. *Chen*, [97 M.S.P.R. 527](#), ¶ 12. To do so, she must allege facts that would show, if proven, that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious. *Barrett v. U.S. Postal Service*, [107 M.S.P.R. 688](#), ¶ 5 (2008); *Gilbert*, [100 M.S.P.R. 375](#), ¶ 16; *Chen*, [97 M.S.P.R. 527](#), ¶ 13.

¶11 The AJ correctly held that the appellant met prongs (1)-(3) above. Whether there is Board jurisdiction turns on whether the appellant made a nonfrivolous allegation that the agency’s action was arbitrary and capricious. We find that she

did so. The AJ held that the appellant failed to provide any facts in support of her assertion that the agency did not conduct a search for restoration for her within the local commuting area. Facts without support do not constitute nonfrivolous allegations. *See Riojas v. U.S. Postal Service*, [88 M.S.P.R. 230](#), ¶ 3 (2001) (citing *Briscoe v. Department of Veterans Affairs*, [55 F.3d 1571](#), 1573 (Fed. Cir. 1995)). In this case, however, the agency's own evidence corroborates the appellant's assertion. *See Ferdon v. United States Postal Service*, [60 M.S.P.R. 325](#), 329 (1994) (in determining whether the appellant has made a nonfrivolous allegation, an AJ may consider the agency's documentary submissions).

¶12 The April 29, 2009, letter directing the appellant to leave work and not to return until further notice states as follows:

[A] search for operationally necessary tasks meeting your medical restrictions within your regular hours of duty (tour) and this office/facility was completed. Based on this search, we were unable to identify any available operationally necessary tasks within your medical restrictions[.]

IAF, Tab 5, Subtab 4F. Attached to the letter is a document titled "National Reassessment Process, Phase 2, Limited Duty; Priority for Assignment Worksheet, Steps 1-2, within regular schedule (tour) and current facility." *Id.* It is filled out for the appellant, at the LA P&DC, tour 3, and signed by the appellant's supervisor. *Id.* It states as follows:

I have made every reasonable effort to search for and identify operationally necessary tasks for this employee within their current medical restrictions; within their craft; within their regular schedule (tour) and within their current facility. I have been unable to identify adequate available operationally necessary tasks for this employee within these requirements.

Id. The form also makes the same statement with regard to a search outside the appellant's craft. *Id.*

¶13 The agency's documents state only that it searched within the appellant's facility, the LA P & DC, and not within her commuting area, as required by OPM

regulations. *See* [5 C.F.R. § 353.301](#)(d) (agencies must make every effort to restore in the local commuting area). This supports the appellant's allegation in her appeal that the agency conducted only a limited search, contrary to the regulatory requirement. Accordingly, we find that the appellant's assertion, supported by the agency's documentary submission, constitutes a nonfrivolous allegation that the agency's action in rescinding her limited duty assignment was arbitrary and capricious.

¶14 The appellant has therefore met all four prongs of the test for Board jurisdiction and is entitled to a hearing on the merits of her appeal. *See Tat*, [109 M.S.P.R. 562](#), ¶ 19; *Foley*, [105 M.S.P.R. 307](#), ¶ 11. Because the Board has jurisdiction over the appeal, the AJ must also adjudicate the appellant's disability discrimination claim. *Barrett*, [107 M.S.P.R. 688](#), ¶ 8.

¶15 Finally, in finding jurisdiction and remanding for a hearing, we do not rely on the appellant's arguments on PFR regarding violation of NRP procedures, the CBA and the ELM. We discern no reason to disturb the AJ's findings that these allegations were unsupported and thus insufficient to constitute nonfrivolous allegations of Board jurisdiction. In addition, we find it unnecessary to address the appellant's arguments on PFR regarding the agency's failure to provide complete discovery responses. Any outstanding discovery matters can be addressed during proceedings on remand.

ORDER

¶16 Accordingly, we remand the appeal to the Western Regional Office for adjudication of the merits of the appellant's restoration appeal consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.